STATE OF MICHIGAN

COURT OF APPEALS

KEITH DOETSCH,

Plaintiff-Appellee,

v

ALLEN GOLDEN,

Defendant-Appellant,

and

CITY OF STERLING HEIGHTS and KEVIN ERNST,

Defendants-Non-Parties.

UNPUBLISHED
January 31, 2003

No. 227711
Macomb Circuit Court
LC No. 93-002932-NO

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Plaintiff filed this action for false arrest, false imprisonment, and malicious prosecution. The malicious prosecution claim was dismissed before trial. A jury found in favor of plaintiff against defendant Golden, a police officer, on the false arrest and false imprisonment claims, but found no cause of action with respect to plaintiff's claims against defendant Ernst. The trial court subsequently awarded plaintiff judgment against defendant Golden (hereafter "defendant") in the amount of $123,965. Defendant appeals as of right. We reverse and remand for entry of judgment in favor of defendant.

Defendant argues that the trial court's finding of probable cause in connection with the dismissal of the malicious prosecution claim became the law of the case and, accordingly, required dismissal of plaintiff's claims for false arrest and false imprisonment. Alternatively, defendant argues that there was no question of material fact concerning the existence of probable cause for arrest and, therefore, the trial court should have granted his motions for directed verdict and judgment notwithstanding the verdict (JNOV).

Whether the law of the case doctrine applies is a question of law to be reviewed de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The law of the case doctrine provides that, "as a general rule, an *appellate* court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Grievance*

Administrator v Lopatin, 462 Mich 235, 260; 612 NW2d 120 (2000) (emphasis added). That rule is inapplicable here because there was no determination of an issue by an appellate court. Furthermore, defendant has failed to cite any authority holding that this doctrine applies to a trial court's own decisions. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). Therefore, we reject defendant's argument that the trial court's ruling on the malicious prosecution issue established the law of the case for purposes of the false arrest and false imprisonment claims.

Nonetheless, we agree that the trial court erred in denying defendant's motion for a directed verdict. This Court reviews a trial court's decision on a motion for directed verdict or JNOV de novo. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000); *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999). "The appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party" to determine whether a question of fact existed. *Wilkinson*, *supra* at 391; see also *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986); *Candelaria*, *supra* at 71-72. "If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury." *Matras*, *supra* at 681-682.

A police officer is not liable for false arrest or false imprisonment if the arrest is supported by probable cause. See *Blase v Appicelli*, 195 Mich App 174, 177; 489 NW2d 129 (1992); see also *Flones v Dalman*, 199 Mich App 396, 404-405; 502 NW2d 725 (1993). "[T]he question of probable cause is an objective test that 'involves only the conduct of a reasonable man under the circumstances.'" *Mathews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 387; 572 NW2d 603 (1998), quoting *Koski v Vohs*, 426 Mich 424, 432; 395 NW2d 226 (1986). "To constitute probable cause . . . there must be such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged." *Mathews*, *supra* at 387, quoting *Wilson v Bowen*, 64 Mich 133, 138; 31 NW 81 (1887).

Where a "plaintiff's proofs make out a prima facie case, want of probable cause is a question of law to be determined by the court." *Mathews*, *supra* at 381. By contrast, "[w]here the facts on which the issue turns are in dispute, the question is for the jury." *Mathews*, *supra* at 381-382.

"A simple criminal[1] assault 'is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Sanford*, 402 Mich 460, 478; 265 NW2d 1 (1978), quoting Perkins on Criminal Law (2d ed), pp 116-117; see also *People v Jones*, 443 Mich 88, 92; 504 NW2d 158 (1993). It is not necessary that the victim be put in "reasonable fear of immediate harm," but doing so is also an actionable form of assault. *Sanford*, *supra* at 478-479. A battery is "the wilful touching of the person of another by the aggressor or by some substance put in motion by

[1] The criminal concepts of assault and battery are "entirely different" from their civil counterparts. *Sanford*, *supra* at 476-477; see also *Mitchell v Daly*, 133 Mich App 414, 425-426; 350 NW2d 772 (1984). Nevertheless, they are often used interchangeably.

him; or, as it is sometimes expressed, a battery is the consummation of the assault." *People v Bryant*, 80 Mich App 428, 433; 264 NW2d 13 (1978), quoting *Tinkler v Richter*, 295 Mich 396, 401; 295 NW 201 (1940), quoting 6 CJS 796, § 1.

In this case, viewed most favorably to plaintiff, the evidence established that plaintiff, by his own admission, wilfully touched defendant by repeatedly pushing his hands away when defendant attempted to conduct a pat down search. Unless the pat down was unlawful, plaintiff had no lawful right to resist in this manner. His actions in doing so amounted to a battery committed in defendant's presence, thereby giving rise to probable cause to arrest him. Cf. *People v Solak*, 146 Mich App 659, 664-665, 670; 382 NW2d 495 (1985) (where the defendant denied any touching but police officers testified that there was either a punch or a slap, there was a question of fact concerning whether there was a battery); see also MCL 764.15(1)(a).

Thus, the disposition of this case turns on whether defendant was justified in conducting a protective pat down search of plaintiff. In this regard, defendant argues that the trial court erred in refusing to decide this issue as a matter of law and, instead, submitting the issue to the jury. We agree.

"A police officer may perform a limited pat down search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons." *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Custer*, *supra* at 328, quoting *Terry v Ohio*, 392 US 1, 27; 88 S Ct 1868; 20 L Ed 2d 889 (1968). "Reasonable suspicion entails more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *Custer*, *supra* at 328, quoting *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). "In order to demonstrate reasonable suspicion, an officer must have 'specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the intrusion.'" *Custer*, *supra* at 328, quoting *Terry*, *supra* at 21. This is determined considering the totality of circumstances. *Custer*, *supra* at 328.

In *People v Taylor*, 214 Mich App 167, 169-171; 542 NW2d 322 (1995), this Court held that police officers were justified in frisking the defendant where they saw him standing around with two or three juveniles in front of a school and, when they approached, the officers "observed a bulge in the front of defendant's jacket in the waist area." Similarly, in *People v Muro*, 197 Mich App 745, 746-748; 496 NW2d 401 (1993), this Court found that a pat down was justified where, after being stopped for a traffic violation, the defendant and his passenger seemed "very nervous and fidgety" and, when the officer walked back to the patrol car, they "made several movements of [the] head, left shoulder, and left arm toward the center of the truck," i.e., toward each other.

In the present case, it is undisputed that, when defendant began asking plaintiff questions, plaintiff offered to show him what he had purchased, and began pulling a bag out of the front pouch of his sweatshirt, inside his down vest. According to defendant, plaintiff approached the patrol car very quickly while attempting to quickly pull something out of his jacket. Plaintiff admitted telling defendant not to bother him in a "very, very loud" voice. It is also undisputed that defendant observed shotgun shells inside the bag plaintiff was carrying. Consistent with

defendant's claim that he observed a large bulge under plaintiff's coat, plaintiff testified that the bag also contained a tube of caulk and some braided nylon yarn. While defendant admitted that he had no evidence that plaintiff was actually armed and dangerous, he testified that he was concerned that plaintiff "could have been" armed and the objective facts justified that suspicion.

We conclude that, under the totality of the circumstances, the undisputed and objective facts, which include plaintiff's aggressive conduct, the bulge under plaintiff's coat, the manner in which plaintiff was reaching for it, and the presence of ammunition in the bag, were sufficient to give rise to a reasonable suspicion that plaintiff may have been carrying a weapon on his person, thereby justifying a protective pat down search. It was not necessary that defendant be certain that plaintiff was armed. Rather, a reasonably cautious person viewing all the facts would have been warranted in suspecting that plaintiff may have been armed and dangerous. Furthermore, because there was no question of material fact concerning the facts necessary to decide this question, the issue was one of law for the court, not a question of fact for the jury.

Therefore, we conclude that the trial court erred in denying defendant's motion for a directed verdict. Accordingly, we reverse the judgment in favor of plaintiff on his claims against defendant and remand for entry of judgment in favor of defendant. In light of our disposition, it is unnecessary to consider defendant's remaining issues.

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder